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In The

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

PRELIMINARY STATEMENT

James E. Douglas, Jr., Commissioner of Marine Resources of the Commonwealth of Virginia, appeals from the order and opinion of the three-judge District Court for the Eastern District of Virginia, entered on November 7, 1975, declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, as violative of the equal protection clause of the Fourteenth Amendment and the exclusive and preemptory authority of the federal government in regulation of "com-

mercial sea fisheries,"[1] and permanently enjoining appellant, his successors, agents and employees, from enforcement of the said statutes. The appellant files this Jurisdictional Statement asserting that the Supreme Court of the United States has jurisdiction of the appeal and that the questions presented by the appeal are substantial.

OPINION OF THE COURT BELOW

The order and opinion of the three-judge District Court declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, and enjoining their enforcement is not reported. The order and opinion are set forth in the Appendix, *infra*, at App. 1 and App. 2, respectively.

JURISDICTION

This suit was brought by the Appellees in the Court below before three judges, pursuant to 28 U.S.C. § 2284, seeking an order declaring unconstitutional two Virginia statutes and enjoining the enforcement of those statutes. The order and opinion of the three-judge District Court granting the relief requested by the Appellees was entered on November 7, 1975. Notice of Appeal was filed by the Appellant on January 5, 1976 in the United States District Court for the Eastern District of Virginia. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. § 1253.

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[1] The Court below found that by enactment of 16 U.S.C. § 1081, *et seq.*, the federal government had exclusive and preemptory authority to regulate "commercial sea fisheries." The term "commercial sea fisheries" apparently refers, geographically, to the territorial waters of the United States, including all waters from the coast out to a limit twelve miles seaward of the coast, since that is the area addressed by 16 U.S.C. § 1081 *et seq.*

STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94.

> (1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.
>
> (2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.
>
> (3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, sein, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virginia would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent,

upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the licensee until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plaintiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29.

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person

who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

QUESTIONS PRESENTED

1. Whether the doctrine of federal abstention is applicable where persons denied commercial fishing licenses under state fisheries statutes challenge the constitutionality of those statutes in federal court?
2. Whether enactment of 16 U.S.C. § 1081, prohibiting foreign vessels from fishing in United States territorial waters except upon concurrent federal and state authorization, reserves to the federal government exclusive and preemptive authority to regulate fisheries within the three-mile limit?
3. Whether enforcement of a state fisheries law which applies to all state waters, both inland and coastal, may be enjoined completely on the basis of its preemption by a federal fisheries statute which applies only to coastal waters?
4. Whether the equal protection clause of the Fourteenth Amendment precludes enforcement of state laws designed to protect state fisheries from incursions of foreign fishing interests by requiring commercial fishing licensees to be United States citizens?
5. Whether the equal protection clause of the Fourteenth Amendment precludes states from reserving to state residents fisheries within their inland waters?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed in the District Court below a Complaint and Motion for Preliminary Injunction, requesting that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to declare §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional and to enjoin the Appellant from enforcement of said statutes. On the same date Appellees filed a Motion for a Temporary Restraining Order against Appellant's continued enforcement of § 28.1-81.1 pursuant to which Appellees had been denied commercial fishing licenses for failure to satisfy United States citizenship requirements of the aforementioned statute.

The District Court, with one judge sitting, denied Appellees' request for a Temporary Restraining Order on July 15, 1975. On July 18, 1975 the lower court granted Appellees' request that a three-judge court be convened to consider the full Complaint and Motion for Preliminary Injunction. An Answer and Motion to Abstain were filed on July 31, 1975 by the Appellant. On October 1, 1975 the Appellees filed a Motion for Summary Judgment. On October 15, 1975 the District Court of three judges heard argument on all Motions previously filed and argument on the merits of the Complaint. By order entered on November 7, 1975 the District Court granted Appellees' Motion for Summary Judgment, finding both statutes in question unconstitutional and enjoined further enforcement of each statute by the Appellant.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. Va. Code Ann. § 28.1-13.

The Appellee, Seacoast Products, Inc., is a Delaware corporation with principal offices in New Jersey. The Appellee, Smith Meal Corporation, is a Massachusetts corporation with its main office in New Jersey. Second Oceanic Corporation is a New York corporation and has its principal offices in that state. Smith Meal and Second Oceanic are subsidiaries of Seacoast, which in turn is ultimately controlled by Hanson Trust, Ltd., a corporation organized under the laws of the United Kingdom and wholly owned by alien stockholders.[2] Appellees are engaged in, among other businesses, the taking and processing of menhaden fish for the manufacture of fish meal, fish solubles used in animal feed, and fish oil for manufacture of margarine. Prior to the enactment of § 28.1-81.1 in 1975 the Appellees had applied for and obtained non-resident licenses for vessels to fish for menhaden within the three-mile limit off the coast of Virginia, but the record will show that they had engaged in minimal fishing activity in Virginia waters in recent years. (Stipulation of October 15, 1975). Contrary to the District Court's assertion at page 4 of its opinion (App. 3) Appellees had not historically fished for menhaden in the Chesapeake Bay, since Virginia Code, § 28.1-60, one of the statutes here in question, precluded menhaden fishing by non-resident corporations in the Chesapeake Bay.

It should, furthermore, be noted that § 28.1-81.1, requiring United States citizenship as prerequisite to obtaining commercial fishing licenses in Virginia, applies to all types of licenses, not only menhaden licenses and applies to all Virginia waters, not merely the waters within the three-mile limit. The Court below states incorrectly on page 3 of its opinion (App. 2) that § 28.1-81.1 applies only to the waters of the three-mile limit off Virginia coast.

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[2] The ownership of more than twenty-five percent of Appellees' corporate stock by aliens rendered Appellees ineligible for fishing licenses under § 28.1-81.1(b).

THE QUESTIONS ARE SUBSTANTIAL

Whether The Doctrine Of Federal Abstention Is Applicable Where Persons Denied Commercial Fishing Licenses Under State Fisheries Statutes Challenge The Constitutionality Of Those Statutes In Federal Court?

The decision of the lower court, in refusing to abstain, represents a departure from the guidelines established by this Court in *Alabama Public Service Commission* v. *Southern Rwy. Co.,* 341 U.S. 341 (1951), *Burford* v. *Sun Oil Co.,* 319 U.S. 315 (1943) and *Great Lakes Dredge Co.* v. *Huffman,* 319 U.S. 293 (1943). In these cases there is enunciated a sound policy of federal abstention in order "to avoid obstruction of the domestic policy of the states." *Great Lakes Dredge Co., supra.* The central notion of the aforementioned decisions is that domestic policies and programs of the states should not be lightly overturned on constitutional grounds by federal courts granting equitable relief, particularly where the complaining parties have adequate remedies in state courts. The Appellees in this case have adequate remedies under state law affording opportunity for state court review of the Appellant's decision denying them licenses. Va. Code Ann. §§ 28.1-33 and 28.1-34. The federal constitutional questions raised by the Appellees could be raised before state tribunals.

Moreover, by abstention in this case, the lower court would have avoided needless interference with the uniquely complex problem of managing state fisheries resources. This Court, in *Reetz* v. *Bozanich,* 397 U.S. 82 (1970) recognized the inherent complexity of the factors bearing upon state management of fisheries resources as justification for federal abstention. In the instant controversy, as in *Reetz,* state statutes bearing on eligibility for fishing licenses are questioned on constitutional grounds. The *Reetz* Court, in balancing the possible hardship placed upon those denied licenses against the disruption of complex programs for state resources management noted that the state provisions challenged related to fish resources, a "unique resource, the management of which is a matter of great state concern." *Reetz, supra.* Any question of unclear state law in *Reetz* was at best a secondary consideration, the Court noting that interpretation might "conceivably avoid" decision upon the constitutional questions.

The impact of the lower court's decision upon domestic fisheries management in Virginia cannot be minimized. By voiding § 28.1-60 the District Court leaves the limited, yet vital, menhaden resource of the Chesapeake Bay in jeopardy of serious depletion by the influx of menhaden vessels from neighboring states. Moreover, Virginia's fisheries resources generally are now vulnerable to the characteristically predatory fishing practices of foreign fishing interests as a result of invalidation of § 28.1-81.1. The balancing of state concerns against the interests of those denied licenses here, as in *Reetz,* results in the conclusion that federal abstention from this controversy is proper.

Whether Enactment Of 16 U.S.C. § 1081, Prohibiting Foreign Vessels From Fishing In United States Territorial Waters Except Upon Concurrent Federal And State Authorization, Reserves To The Federal Government Exclusive And Preemptive Authority To Regulate Fisheries Within The Three-Mile Limit?

The District Court, in reviewing the constitutionality of Virginia Code § 28.1-81.1, which makes United States citizenship a prerequisite to eligibility for all commercial fishing licenses, finds that Congressional enforcement of 16 U.S.C. § 1081 (App. 7), ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them . . ." (App. 5). Thus, it is held that

Congress, by enactment of a federal statute addressing the very limited subject of fishing in United States territorial waters by foreign vessels, has thereby preempted the entire field of fisheries regulation in coastal waters, including fisheries within the three-mile limit.

The practical implications of the District Court's holding are devastating to the legitimate interests of the states in regulating commercial fishing activity off their coasts within the three-mile limit. That the states have the authority to regulate coastal fisheries inside the three-mile limit so long as there is no conflict with federal enactments has long been recognized. *Skiriotes* v. *Florida,* 313 U.S. 69 (1941). Since the decision below finds that states are preempted from regulation of "commercial sea fisheries" in general, states would be powerless to regulate fishing off their coasts by United States vessels. Any and all state conservation laws and regulations dealing with net sizes, types of vessels and equipment used in coastal fisheries by United States vessels, as well as foreign vessels, would be superseded and preempted by 16 U.S.C. § 1081 under the District Court's holding. Clearly this could never have been the intent of Congress in the enactment of 16 U.S.C. § 1081.

The District Court, in this regard, is at odds with the most elementary principles of preemption laid down by this Court in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Kelly* v. *Washington,* 302 U.S. 1 (1937), *Mintz* v. *Baldwin,* 289 U.S. 346 (1933), *Savage* v. *Jones,* 225 U.S. 501 (1912) and *Reid* v. *Colorado,* 187 U.S. 137 (1902). In each of the above-mentioned cases this Court held to the effect that ". . . Congress having occupied but a limited field, the authority of the state to protect its interests by additional or supplementary legislation otherwise valid is not impaired." *Skiriotes, supra,* at 75. Accordingly, to the extent that the District Court finds 16 U.S.C. § 1081 preemptive of state

laws regulating matters other than use of United States coastal fisheries by foreign vessels, it is patently wrong.

Moreover, even if the District Court's preemption holding is limited such that 16 U.S.C. § 1081 is viewed as preempting only state statutes dealing with use of coastal fisheries (within the three-mile limit) by foreign vessels, such a finding is clearly erroneous. According to familiar principles, in order to find federal enactments preemptive there must be expressed statutory intent to preempt the field in question or it must be shown that federal and state regulation of a field cannot operate together consistently. *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 142 (1963); *Savage* v. *Jones,* 225 U.S. 501, 535 (1912). It cannot be seriously argued that 16 U.S.C. § 1081 contains any express intent to occupy the field of regulating foreign fishing in state coastal waters. To the contrary, 16 U.S.C. § 1081 requires that any federal approval of foreign fishing thereunder is conditioned upon the concurrence or approval of any affected state or territory. Yet the District Court, in describing the purport of 16 U.S.C. § 1081 blandly states that the vitality of Virginia Code § 28.1-81.1 is superseded by the federal enactment which declares "as far as pertinent here that '[i]t is unlawful for any vessel, except a vessel of the United States . . . to engage in the fisheries within the territorial waters of the United States . . .' *except upon authorizations not relevant here.*" (Emphasis supplied.) The authorizations required under 16 U.S.C. § 1081 include authorization of affected states and, therefore, could not be more relevant in any determination than 16 U.S.C. § 1081 is preemptory of state laws. Indeed, the requirement of 16 U.S.C. § 1081 that state approval be given prior to federal approval of foreign fishing indicates an express intent to avoid preempting state interests. It is furthermore evident that the federal and state statutes here involved may

operate concurrently without one frustrating the effect of the other. The operation of Virginia Code § 28.1-81.1 in precluding foreign fishing within the three-mile limit would not of itself eliminate the possibility of federal authorizations under 16 U.S.C. § 1081 allowing foreign vessels to fish off Virginia's coast between the three-mile limit and the outer limit of United States territorial waters twelve miles offshore. Virginia could concur in federal approval of foreign fishing beyond the three-mile limit off its coast under 16 U.S.C. § 1081 consistent with the provisions of § 28.1-81.1 of its own law prohibiting foreign fishing within the three-mile limit. The federal and state enactments in question are clearly consistent in their purpose, both limiting foreign fishery in United States coastal waters. This is not to say that the federal government could not preempt state laws dealing with foreign fishing within three miles of the coast under the holdings of *Skiriotes* and other cases. The fact is, however, that the provisions of 16 U.S.C. § 1081 evidence no intent on the part of the Congress to effect a preemption, but instead reveal an intention to the contrary.

By holding that 16 U.S.C. § 1081 ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them . . ." (App. 5) the District Court has left in doubt the formerly settled legal principles governing the federal-state relationship in regulation of commercial fisheries within the three-mile limit. As a result no state can confidently enact necessary new laws or continue to enforce existing laws regulating and managing coastal fisheries within the three-mile limit, even though such state laws in no way conflict with federal enactments or treaties. The rules formerly set out in *Skiriotes* v. *Florida,* 313 U.S. 69 (1941), *Toomer* v. *Witsell,* 334 U.S. 385 (1948) and *United States* v. *California,* 332 U.S. 19 (1947)

are now unsettled by the opinion of the lower court. In short, the importance of clarifying the important relationship between federal and state authority in the regulation of sea fisheries within the three miles of the coast is sufficient reason for this Court to consider this case fully, with briefs and argument on the merits.

Whether Enforcement Of A State Law Which Applies To Inland And Coastal State Waters May Be Enjoined Completely On The Basis Of Preemption By A Federal Statute Which Applies Only To Coastal Waters?

The federal statute, 16 U.S.C. § 1081, found as preemptive of Virginia Code § 28.1-81.1, clearly applies only to United States territorial waters between the United States coast line and a limit twelve miles offshore. Section 28.1-81.1 of the Virginia Code, on the other hand, applies generally to all Virginia waters, both coastal waters inside the three-mile limit and inland waters as well. The lower court has enjoined the enforcement of § 28.1-81.1 generally, finding it superseded by 16 U.S.C. § 1081, which, of course, has no application to Virginia's inland waters. It is, therefore, apparent that the decision of the District Court is in direct contravention of the principles of preemption established in *Savage* v. *Jones, supra, Mintz* v. *Baldwin, supra,* and *Kelly* v. *Washington, supra.* Consequently, the Appellant is left powerless to enforce in inland waters of the State a law designed to protect all of Virginia's waters from incursions by foreign fishing interests because of its alleged preemption by a federal law having no application to inland fishery. This imprecise and clearly erroneous holding of the District Court further confuses the interplay of federal and state regulation of commercial fisheries and amplifies the substantiality of the questions which are urgently in need of resolution by this Court.

Whether The Equal Protection Clause Of The Fourteenth Amendment Precludes Enforcement Of State Laws Designed To Protect State Fisheries From Incursions Of Foreign Fishing Interests By Requiring Commercial Fishing Licensees To Be United States Citizens?

Virginia Code § 28.1-81.1, requiring United States citizenship as a prerequisite to eligibility for all commercial fishing licenses, is predicated upon the well established fact that those persons who live near a natural resources and are continually dependent upon the resource for their livelihood do, in fact, utilize and conserve the resource more responsibly. It has been well established statistically and through practical experience that foreign fishing interests practice predatory, wasteful fishing techniques resulting in drastic depletions of vital American fishery stocks. National Marine Fisheries Statistics, published by the United States Department of Commerce, document the foregoing premises. Comparison of 1973 Virginia landings of four important coastal fish species with the average landings of the same species for the ten years preceding 1973 show startling stock depletions.[3] The statistics reveal a direct relationship between the timing of noticeable stock depletions and the entry of foreign fishing effort.

Prior to enactment of § 28.1-81.1, the only requirement for obtaining commercial fishing licenses in Virginia was residency. Va. Code Ann. §§ 28.1-47, 28.1-48, 28.1-57. Thus any corporation located and operating in Virginia could obtain commercial fishing licenses and operate in all inland and coastal waters of the state, irrespective of the fact that the corporate stock may have been owned by totally foreign interests. Quite obviously, those who own corporate stock determine corporate policy and fishing practices. Establishing Virginia shell corporations and use of American crews by foreign controlled corporations will in no way deter a corporate policy of predatory fishing. Accordingly, Virginia fishery stocks were, prior to enactment of § 28.1-81.1, vulnerable to the predatory fishing effort of foreign-owned shell corporations which might have been established in Virginia for the sole purpose of meeting the residency requirement for obtaining licenses.

[3] Complete reference to the statistics is contained in the Deposition of James E. Douglas, Jr., Appellant, pp. 10-11, filed as part of the record.

Federal law provides no additional protection. As noted above, 16 U.S.C. § 1081 provides that only "United States vessels" may engage in the fisheries of United States territorial waters. Pursuant to 46 U.S.C. § 251 "United States vessels" are defined as those of twenty-tons or more meeting federal enrollment requirements and having a current license. Vessels of less than twenty-tons need only have a license, and are not required to be enrolled. Enrollment as a United States vessel requires, pursuant to 46 U.S.C. § 252 and 46 U.S.C. § 11, only that the vessel be built within the United States and that it be owned wholly by United States citizens. The requirement of 46 U.S.C. § 11 that the vessel be owned wholly by United States citizens has been applied to corporate ownership of fishing vessels so as to require only that the corporation owning the vessel be organized under the laws of one of the United States and located in that state. Ownership of the stock in such domestic corporations owning fishing vessels may be entirely alien; so long as the foreign owned corporation establishes a domestic shell corporation in the United States its vessels will qualify as "United States vessels" eligible to fish in United States waters. It is, therefore, apparent that neither Virginia law nor federal law, prior to enactment of § 28.1-81.1, protected Virginia fisheries from the predatory fishing efforts of wholly alien-owned shell corporations which might be

domesticated in Virginia and, thereafter, operate freely in any and all of Virginia's waters.

If Virginia Code § 28.1-81.1 is deemed invalid, Virginia and every other state with valuable domestic fisheries will be powerless to prevent the potentially devastating effect of the predatory practices of foreign-owned corporations, owned and controlled abroad by those with no permanent vested interest in conservation of the resource.

While the District Court did not squarely meet the Appellees' contention that the citizenship requirement of Virginia's statute violates principles of equal protection, there is some intimation of that view in portions of the lower court's opinion (App. 3).

This Court has consistently recognized a right of the states to distinguish between citizens and aliens with respect to matters in which the states have a proprietary interest. In *Hauenstein* v. *Lynham,* 100 U.S. 483 (1880) and *Blythe* v. *Hinckley,* 180 U.S. 333 (1901) state provisions barring aliens from the devolution of real property were upheld. Laws barring aliens from the ownership of real property were approved by this Court in *Terrace* v. *Thompson,* 263 U.S. 197 (1923), *Porterfield* v. *Webb,* 263 U.S. 225 (1923) and *Webb* v. *O'Brien,* 263 U.S. 313 (1923).

The proprietary interest of states in conserving their natural resources has, as well, been recognized by this Court. A state law barring aliens from hunting wild game was sustained against an equal protection challenge in *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914). In *McCready* v. *Virginia,* 94 U.S. 391 (1877) a Virginia law reserving to state residents the right to take oysters from the state's river beds was held valid. While invalidating as a denial of equal protection an Arizona law discriminating against aliens in *all* occupations in *Truax* v. *Raich,* 239 U.S. 33 (1915), this

Court noted that a special state interest with respect to *any particular business or occupation* could justify a law barring aliens from that particular occupation. The Court, in *Truax,* specifically distinguished the law there found invalid from laws relating to a state's natural resources. Virginia's statute under scrutiny here limits its proscription against aliens to a single business or occupation and that occupation is integrally related to preservation of state natural resources.

The decision of this Court in *Takahashi* v. *Fish Commission,* 334 U.S. 410 (1948) is, for a number of reasons, not persuasive or controlling here. Initially, it is important to note that the classification made by the California law in *Takahashi* was essentially racial rather than one of alienage. Only those "ineligible for United States citizenship" were barred from the California commercial fishery. The practical effect of the law was to bar primarily persons of Japanese origin. Moreover, the California law was defended as a conservation measure on the flimsy premise that elimination of those ineligible for citizenship reduced the numbers of commercial fishermen, thereby conserving stocks. Virginia's law does not exclude non-citizens for the sake of eliminating a portion of the fishing effort irrespective of any other distinguishing characteristic of the eliminated group. The Virginia law is, on the other hand, supported by statistical evidence showing the ill effects of foreign fishing practices upon efforts to conserve stocks. It is not alienage *per se,* but the characteristic fishing practices of foreign fishing interests which the Virginia statute seeks to avoid. Finally, in considering the applicability of *Takahashi* here it is of critical importance to note that the precedents sustaining alienage classifications which protect state proprietary interests in *Patsone, Hauenstein, Blythe, Terrace* and *Porterfield,* were rejected in *Takahashi* because the court viewed as tenuous the claim by California that it had a

proprietary interest in fish within the three-mile coastal waters. Whatever doubts this Court may have had in *Takahashi* regarding state ownership of fish in coastal waters must certainly have been put to rest by the subsequent enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq*. Section 1311 of that enactment confirms the title and ownership of states in submerged lands and natural resources in and under navigable waters within state boundaries, including any and all fish and other marine life therein. Section 1301 defines "natural resources" to include virtually all types of fish and shellfish. In view of this clear and unequivocal confirmation of state proprietary ownership in its fisheries resources it cannot now be seriously maintained that *Takahashi* is controlling of the question here. Instead, the proprietary interest of the states in their fisheries having now been established, Virginia's law which seeks to protect that vital interest from the depredations of foreign fishing interests should, therefore, be sustained. *Patsone, supra; Terrace, supra; Hauenstein, supra; Porterfield, supra.*

Whether The Equal Protection Clause Of The Fourteenth Amendment Precludes States From Reserving To State Residents Fisheries Within Their Inland Waters.

Placing reliance in this Court's decisions in *Takahashi* v. *Fish Commission,* 334 U.S. 410 (1948) and *Toomer* v. *Witsell,* 334 U.S. 385 (1948), the District Court declared violative of the equal protection clause Virginia Code § 28.1-60, reserving to state residents the menhaden fishery inside the Virginia portion of Chesapeake Bay. For essentially the same reasons discussed above with respect to § 28.1-81.1, *Takahashi* has, contrary to the holding of the District Court, no application to the question presented here in regard to § 28.1-60. *Takahashi* turned upon the failure

of this Court to find a state proprietary interest in coastal fisheries sufficient to justify barring aliens. The effect of the Submerged Lands Act is to make clear the states' proprietary interest in their fisheries and, thereby, render inapplicable here the principles controlling *Takahashi*. For the same reason *Toomer* is not dispositive of the constitutional challenge made with respect to Virginia's residency law. Moreover, the statute here in question reserves to residents an inland fishery within the Chesapeake Bay. *Toomer* dealt with state residency requirements in coastal fisheries. The states' ownership of fisheries in inland bodies of water has never been seriously questioned as was ownership of coastal fisheries prior to the Submerged Lands Act.

The principles set forth in *McCready* v. *Virginia,* 94 U.S. 391 (1877), recognizing the clear right of a state to reserve for its residents the natural resources of its waters which it owns and holds in trust for its citizens, are equally applicable here. The same rights of the states to reserve their natural resources were recognized by this Court in *Geer* v. *Connecticut,* 161 U.S. 519 (1896) and again in *Patsone* v. *Pennsylvania,* 232 U.S. 138 (1914).

The decision of the District Court, failing as it does to distinguish *Takahashi* and *Toomer* from the instant situation as altered by the Submerged Lands Act, indeed, has the effect of depriving Virginia of the rights and interests in her submerged lands and fisheries that the federal enactment (43 U.S.C. § 1301 *et seq.*) was intended to convey. It cannot be more clear from the face of the Submerged Lands Act itself that one of the purposes of that legislation was to settle upon the states, free of any doubt, full right and title to the submerged beds and resources located over and upon those lands. This Court can, by review of the District Court's decision, once and for all, effect the obvious purpose of the Submerged Lands Act, confirming the proprie-

tary interest of the states in their limited natural resources, and reaffirm the right of the states to protect their interest established in *Patsone, McCready* and other decisions of this Court noted above.

CONCLUSION

For the reasons herein stated probable juris should be noted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one counsel for James E. Douglas, Jr., in the above captioned matter, hereby certify that three (3) copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this 5th day of January, 1975, as follows:

Thomas H. Willcox, Jr., Esquire
Willcox, Savage, Lawrence, Dixon and Spindle
1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorney for the Appellees

All persons required to be served have been served.

JAMES E. KULP
Deputy Attorney General

APPENDIX

* * *

FINAL ORDER

Filed November 7, 1975

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ Albert V. Bryan
Senior United States Circuit Judge

/s/ Richard B. Kellam
United States District Judge

/s/ John A. MacKenzie
United States District Judge

November 7, 1975.

* * *

OPINION OF THE COURT BELOW

Filed November 7, 1975

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1-81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are

[1] This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. United States v. California, 332 US 19, 33 (1947).

[2] Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

[3] There are no critical, genuine factual differences between the parties.

the determinant factors in the ban of plaintiffs from a piscary for menhaden.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a state statute, Railroad Commission v. Pullman Co., 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, Alabama Public Service Commission v. Southern Railway Co., 341 US 341 (1951); or to avoid obstruction of State prosecutions, Younger v. Harris, 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. Huffman v. Pursue, 420 US 592, 602 (1975); *Younger*, supra, at 53-54; Zwickler v. Koota, 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not proposed to conserve the food supply of the State. It is conceded by plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' first point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is Takahashi v. Fish and Game Commission, 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi,* supra, at p. 420, and in Toomer v. Witsell, 334 US 385, 401 (1948) declined to treat, as *contra,* McCready v. Virginia, 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, et seq., declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . . ," except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. Toomer v. Witsell, 334 US 385, 393, 394 (1948); United States v. California, supra, 332 US 19 (1947); Skiriotes v. Florida, 313 US 69, 75 (1941); Manchester v. Massachusetts, 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was

ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it is not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens. Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester,* supra—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall

and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since its loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in Toomer v. Witsell, supra, 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." Fenner v. Boykin, 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

* * *

§ 1081. PROHIBITION AGAINST FISHING IN TERRITORIAL WATERS; EXCEPTIONS

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or in such waters to engage in activities in support of a foreign

fishery fleet or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this chapter or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of Commerce that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of Commerce that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of Commerce, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.